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In the Supreme Court of the United States

October Term, 1981

DONALD PETERS, ROBERT T. SIMPSON, JR., WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Illinois Supreme Court's holding that the power of the Board of Commissioners of Cook County to

fix compensation, benefits, and working conditions for petitioners employed at Cook County Hospital is a non-delegable discretionary public responsibility constitutes a sufficient independent basis in state law so as to preclude review by this Court.

PROVISIONS INVOLVED

Two of the statutes involved below are set forth in the Petition. In addition, the Cook County Commissioner's Act, Ill. Rev. Stat. 1979, ch. 34, §909, provides:

> Said board of commissioners shall have the management of the affairs of said Cook County, in the manner provided by law, and may exercise the same powers, perform the same duties, and shall be subject to the same rules, regulations and penalties prescribed by law for the board of supervisors in other counties, except as herein otherwise provided; and shall also be subject to the rules, regulations and restrictions herein provided.

The Constitution of the State of Illinois, Article VII, Section 6, provides:

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(b) A home rule unit by referendum may elect not to be a home rule unit.

(c) If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail with its jurisdiction.

(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise approved by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the

concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.

STATEMENT OF FACTS

The Respondent is the Cook County Board of Commissioners (hereinafter, Board), the successor in interest to the Health and Hospitals Governing Commission (hereinafter, Commission).

Prior to July 1969, Cook County Hospital, Oak Forest Hospital, and their allied facilities were under the direction and control of the County of Cook. After that time, the legislatively created Health and Hospitals Governing Commission of Cook County assumed total control of those facilities and held sway for just over ten years. It is a matter of public record that general dissatisfaction with the Commission arose early in its history and finally increased in intensity to the point that the General Assembly, responding to the allegations of gross fiscal mismanagement, abolished the Commission. The commission had managed to amass, in its brief ten year history, a staggering $80-90,000,000 budget deficit.

The alternatives available to the Legislature and the County were to close the facilities for lack of funds or to allow the County an opportunity to drastically trim the costs of running the hospitals in hope of keeping their services available to the medically indigent citizens of the greater Chicago metropolitan area. The second alternative, of course, is the alternative which was selected. The tottering hospital system returned to the control of Cook County through its Board of Commissioners.

During the Commission's existence, it entered into at least seven "union recognition agreements." These agreements purported to obligate the Commission to negotiate with labor unions and sign a continuing series of collective bargaining agreements. These agreements were signed with such diverse groups as the House Staff (doc-

tors in post graduate training) and the Security Staff. Several of these collective bargaining agreements were renegotiated two and three times between 1969 and 1979. Typically, the contracts were for three year periods.

When the County resumed control of the hospital system it recognized those agreements still in effect but announced that it would not enter into new collective bargaining agreements in the future. The County has never collectively bargained with its employees and stated to the Petitioners that it did not intend to do so in the future.

Consequently, three lawsuits were brought in the Circuit Court of Cook County by unions seeking to coerce the County to bargain with them for new contracts (the old ones having expired by their own terms): *Peters* v. *Governing Commission*, 80 CH 2047 (security staff); *Peter* v. *Governing Commission*, 80 CH 2147 (clerical staff); and *House Staff Association* v. *County of Cook*, 80 CH 2335 (house staff). Circuit Judges George A. Higgins, Joseph A. Wosik and Richard M. Curry, respectively, heard those matters and separately concluded that the County's Motions To Dismiss should be granted for the reasons that the "recognition agreements" were terminable at the will of either party for the want of a termination date and that the County of Cook had the inherent authority to exercise its discretion to refuse to bargain with its employees. The trial courts did not reach the federal constitutional issue of impairment of contracts. The first two cases were appealed and consolidated for hearing before the Illinois Appellate Court and Supreme Court. The third case was never appealed.

The Illinois Appellate Court concluded that a termination point existed and therefore the contract was not terminable at will and that the language of the County Hospitals Act clearly requires the Board to assume the Commission's "obligations" to bargain collectively with

its employees despite its "public policy discretionary powers which initially might have been exercised in other ways under different circumstances." Thus, the appellate court found it unnecessary to reach the federal constitutional impairment of contracts agrument raised by petitioners.

The Illinois Supreme Court concluded that the Board had inherent discretion to refuse to enter into collective bargaining agreements with its employees and affirmed the trial court's dismissal of Petitioner's complaints. Like the decisions below, it did not reach Petitioner's constitutional issue. It is this decision which petitioners seek to have this Court review by certiorari.

ARGUMENT

THE ILLINOIS SUPREME COURT'S HOLDING THAT THE POWER OF THE BOARD OF COMMISSIONERS OF COOK COUNTY TO FIX COMPENSATION, BENEFITS, AND WORKING CONDITIONS AT COOK COUNTY HOSPITAL IS A NON-DELEGABLE DISCRETIONARY PUBLIC RESPONSIBILITY CONSTITUTES A SUFFICIENT INDEPENDENT BASIS IN STATE LAW SO AS TO PRECLUDE PREVIEW BY THIS COURT.

Petitioners contend that this Court has jurisdiction to review the Illinois Supreme Court's decision because the County Hospital's Act has been applied in a manner that impairs the collective bargaining agreement. Respondent submits that this is an erroneous interpretation of the opinion of the Illinois Supreme Court.

Where the decision of the state court is based upon an adequate nonfederal ground, review will be declined by this Court. *Wood* v. *Chesborough*, 228 U.S. 672 (1913); *West Chicago Street Railway Co.*, v. *Illinois, ex rel., Chicago*, 201 U.S. 506 (1906); *Chicago B. & Q. R. Co.,v Illinois ex rel., Com'rs.*, 200 U.S. 561 (1906).

Neither the Illinois Supreme Court nor the appellate court reached petitioner's federal constitutional impairment of contract argument. Both courts decided this case on state law grounds. Although the greater part of the appellate court opinion was concerned with whether the collective bargaining agreements were of perpetual duration and therefore terminable at will, the Illinois Supreme Court never even reached this issue. The supreme court held as a matter of state law that a public body may not delegate a discretionary public responsibility with which it is charged. Without embarking on a lengthy discussion of this issue, suffice it to say that the adequacy of this state law

basis is demonstrated by the cases cited in the supreme court opinion.

Even if the state law basis supporting the discretionary powers argument was inadequate, there remains yet a second adequate state law basis to support the supreme court opinion.

Illinois law is clear that contracts which have no specified term, are terminable at the will of either party. *P.S. & E., Inc.* v. *Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1973) citing, *Joliet Bottling Co.*, v. *Joliet Citizens Brewing Co.*, 254 Ill. 215 (1912), and *Schoen* v. *Caterpiller Tractor Co.*, 103 Ill. App. 2d 197 (1968); *First Mission Covenant Church* v. *Rockford Broadcasters, Inc.*, 324 Ill. App. 8 (1944); *Stein* v. *Isse Koch & Co.*, 350 Ill. App. 171 (1953); *Orr* v. *Ward*, 73 Ill. 318; *Morey* v. *Hoffman*, 12 Ill. 2d 125 (1957); *Gage* v. *Village of Wilmette*, 233 Ill. App. 20 *aff'd* 315 Ill. 328; *Adkisson* v. *Ozment*, 55 Ill. App. 3d 108 (1977); *Steinberg* v. *Keepper-Nagel Real Estate*, 14 Ill. App. 3d 619 (1973); *Kraftco Corp.* v. *Koblus*, 1 Ill. App. 3d 635 (1971) and the recently decided case of *Uptown People's Community Health Services* v. *Board of Commissioners of Cook County*, 647 F.2d 727 (7th Cir. 1981).

The petitioners assert that the agreements could be terminated by the Commission if the unions ever lose their majority status, (paragraph 15 of the election agreements, attached as Appendix C of the Petition) or in the event of a party's failure to abide by an arbitrator's ruling. These do not constitute legally cognizable termination points. Many Illinois cases make that point obvious. The first is *Steinberg* v. *Keepper-Nagel Real Estate Investments, Inc., supra.* A real estate sales contract was signed requiring the purchaser to undertake, at its own expense, a rezoning effort within 180 days of the lifting of the Village's apartment rezoning moratorium. The moratorium was not lifted

for three years and the plaintiff-seller filed suit to declare the contract terminated.

There, as here, the contract was executory. That is to say, it required future performances. The Court found that the only time limit for performance mentioned within the contract was the 180 days after the lifting of the moratorium. The Court held,

> "Thus, it is clear that the contract did not express any time limit for its performance.
>
> * * *
>
> Where no definite time is fixed during which an executory contract shall continue in force, it is terminable at the will of either party . . ." [at p. 622]

The *Steinberg* court rejected the purchaser's arguments which are similar to the petitioners' herein: to wit, an indefinite future event is a sufficient termination point. As in *Steinberg*, time had passed since the signing of many of these election agreements and there is no prospect that the condition of loss of majority status will occur in the foreseeable future.

The next case which makes the same point is the *Uptown Community Health Services Board* v. *Board of Commissioners of Cook County, supra.* That case also involved an agreement between the now defunct Hospital Commission and a community group. That management agreement had no termination date and was not for a term of years. Language in the agreement stated that the Commission will provide funding until "economic self-sufficiency" of the clinic is achieved. It had not been achieved at the time the suit was filed.

The United States Court of Appeals for the Seventh Circuit, applying Illinois law, held that the purported contract was executory and was subject to termination at the will of

either party. In this case the Commission had specifically acted to end the agreement unilaterally. The court found that to have been legally done. In the case at bar the County of Cook, successor in interest to the Commission, acted to terminate the "election agreements" by sending written notices to the unions. That legally terminated the executory contracts in question.

There is little room for debate that the "election agreements" in question are executory. They purport to obligate the County to negotiate a continuing series of contracts. Even if the parties were now to negotiate a new three year contract, that would not cause the "election agreement" to be executed. The agreement can never be executed by negotiating collective bargaining agreements whether they be one in number or many. In that sense they are unquestionably perpetual in nature and therefore terminable at the will of either party.

The petitioners and the Illinois Appellate Court relied heavily upon the case of *Stein* v. *Isse Koch and Co., supra,* as authority for the proposition that uncertain events can constitute a termination point. Stein's date of discharge from the Army was said to be uncertain. That is true up to a point. What is overlooked is that the contract's maximum duration was known to al parties at the time of its making. Stein would be required by federal law to leave the Army no later than when he reaches mandatory retirement age. His mustering-out date was not exactly known but a specific point was known beyond which it could not extend. The conditions at bar could be months, years, or generations from now. It has limitless potential life.

There is no question that the "election agreements" are executory to the extent they oblige the County of Cook to enter into future collective bargaining agreements. *Kraftco*

Corp., v. *Koblus, supra*, summarizes the current state of the law.

> "It has long been the holding of the Illinois Courts that where an executory contract fixes no time for its operation, it is terminable at the will of either party." [at p. 640]

Thus, it is clear that there are two adequate bases in state law for the decision of the Illinois Supreme Court in this case. Consequently, this Court should decline to review this case.

Although petitioners also contend that the subsequently enacted County Hospitals Act, Supp. to Ill. Rev. Stat. 1979, ch. 34, §5020, has been applied by the Illinois Supreme Court in a manner which results in an unconstitutional impairment of petitioners' pre-existing collective bargaining agreement, a careful look at the Illinois Supreme Court's opinion clearly discloses the misinterpretation inherent in that argument. The Illinois Supreme Court stated:

> Whether its source is the Constitution (Ill. Const. 1970, art. VII), the Cook County commissioners' act (Ill. Rev. Stat. 1979, ch. 34, §909) or the County Hospitals Act, the power to fix compensation, benefits and working conditions requires the exercise of the Board's discretion.

Any one of these three sources of the Board's discretionary powers are, on an individual basis, sufficient to support the decision in this case. When all are considered together it becomes clear that two of these sources of authority do not fall into the category of subsequently enacted statutes which could have impaired petitioners' collective bargaining agreements.

CONCLUSION

For the foregoing reasons the respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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